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# **EXECUTIVE ORDER 390**

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## **AFFIRMATIVE MARKET PROGRAM IN PUBLIC CONTRACTING**



THE COMMONWEALTH OF MASSACHUSETTS  
Executive Department  
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ARGEON PAUL CELLUCCI  
GOVERNOR

CHARLES D. BAKER  
SECRETARY

By His Excellency

WILLIAM F. WELD  
GOVERNOR

EXECUTIVE ORDER NO. **390**

ESTABLISHING AN AFFIRMATIVE MARKET PROGRAM  
IN PUBLIC CONTRACTING

WHEREAS, The Commonwealth has an affirmative responsibility to develop and maintain equitable practices and policies in the public marketplace;

WHEREAS, a diverse business community strengthens the state economy and is beneficial to all of the citizens of the Commonwealth;

WHEREAS, in 1990, the Massachusetts Commission Against Discrimination conducted hearings and investigations which documented a history of discrimination against minorities and women in the Commonwealth, and in 1994, the Executive Office of Transportation and Construction produced a Disparity Study which documented a history of discrimination against minority and women owned businesses, in which the Commonwealth's agencies were participants;

WHEREAS, this discrimination against minorities and women currently affects the utilization of minority and women owned businesses in state contracting;

WHEREAS, the Commonwealth has a compelling interest in redressing the effects of past discrimination through the utilization of the available and qualified pool of minority and women owned businesses;

NOW, THEREFORE, I, WILLIAM F. WELD, Governor of the Commonwealth of Massachusetts, by virtue of the authority vested in me as Supreme Executive Magistrate, and Lieutenant Governor ARGEON PAUL CELLUCCI, do hereby order as follows:

**Section 1. Declaration of Policy .** It is the policy of the Commonwealth to promote equality in the market and, to that end, to encourage full participation of minority and women owned businesses in all areas of state contracting, including contracts for construction, design, goods and services.

**Section 2. Affirmative Market Plans.** The Commonwealth has a compelling interest in using racial and gender based classifications for the purposes of remedying past discrimination and promoting other, non-remedial objectives such as the delivery of effective human services in the areas of public health, safety and welfare.

Subject to the approval and direction of the Secretary of Administration and Finance, all executive offices, agencies, departments, boards and commissions of the Commonwealth (hereinafter referred to as "Agency" or "Agencies") are hereby directed to implement the narrowly tailored affirmative market program set forth in this Executive Order which shall include race and gender conscious goals where necessary to eliminate disparity between minority or women owned businesses (M/WBEs) and other business entities in the relevant market, defined as the Commonwealth of Massachusetts.

For purposes of this Executive Order, "minority" shall be defined as a permanent resident of the U.S. operating a business within the Commonwealth who is black, Western Hemisphere Hispanic, Asian, American Indian, or Cape Verdean, and a "Minority Business Enterprise" (MBE) as a minority business certified by the State Office of Minority and women Business Assistance (SOMWBA) or another state Agency. A "Woman Business Enterprise" (WBE) shall be a business certified as such by SOMWBA or another state Agency.

Goals for M/WBE participation in state funded contracts shall be based upon the broadest and most inclusive pool of available M/WBEs capable of performing the contracts and interested in doing business with the Commonwealth in the areas of construction, design, goods and services. SOMWBA, or its successor, shall create and maintain a current directory of certified M/WBEs which will serve as one source of information in determining the pool of available M/WBEs. Goals shall be established by the Secretary of Administration and Finance, or his/her designee, and shall be expressed as overall annual program goals, applicable to the total dollar amount of an Agency's contracts awarded during the fiscal year for each of the Agency's types of contracts. The goals established in Section 1.2 of Executive Order 237 shall remain in effect until revised goals are developed pursuant to this Executive order, which shall occur promptly, but in no event later than January 1, 1997. Goals developed pursuant to this Executive Order shall be revised as necessary for the fiscal year beginning July 1, 1997 and at least every two years thereafter.

The Secretary of Administration and Finance, or his/her designee, shall develop a procedure by which Agencies may, for an individual contract, adjust the goals for M/WBE participation (whether the goals are established pursuant to Executive Order 237 or pursuant to this Executive Order) based upon actual availability, geographic location of the project, the contractual scope of work or other relevant factors.

The Secretary of Administration and Finance, or his/her designee, shall develop a good faith efforts waiver procedure by which Agencies may determine, at any time prior to the award of the contract, that compliance with the goals is not feasible and by which Agencies may reduce or waive the goals for an individual contract.

Recognizing the importance of joint ventures and partnerships involving M/WBEs in increasing the participation of M/WBEs in state contracting, the Secretary of Administration and Finance, or his/her designee, shall develop guidelines and procedures for Agencies to follow in contracting with such entities. Such guidelines and procedures shall seek to encourage the development of joint ventures and partnerships for the purpose of contracting with the Commonwealth.

In connection with the affirmative market program, SOMWBA shall regularly review and, where necessary, modify its certification process to ensure that it operates effectively, and shall report annually to the Secretary of Administration and Finance.

**Section 3. Capacity Development.** The Massachusetts Office of Business Development (**MOBD**), or its successor, is hereby designated the state Agency responsible for providing a capacity development program to M/WBEs and other interested businesses seeking to do business with the Commonwealth. The capacity development program shall include, but is not limited to, the following core areas of business development: strategic planning, financial management planning, human resource-management and planning, information technology access and management, and . marketing.

MOBD shall report annually to the Secretary of Administration and Finance on its progress in assisting M/WBEs and other businesses.

Contracting Agencies of the Commonwealth shall supplement the capacity development program provided by MOBD with industry specific assistance, training, education and procurement information.

**Section 4. Program Oversight, Enforcement and Reporting Requirements.** The Secretary of Administration and Finance shall be responsible for the overall management, monitoring and enforcement of the program established pursuant to this Executive Order. A Program Director shall be designated within the Executive Office of Administration and Finance to assist in program development, coordination and compliance. A Director of Enforcement shall be designated within the Executive Office of Administration and Finance with responsibility for monitoring contract compliance across all Agencies, addressing potential program violations and coordinating Agency enforcement activities with SOMWBA and the Attorney General.

Each Secretary and Agency head shall designate a highly placed individual charged with management of this program. Each Secretary and Agency head may designate such other personnel as they deem necessary to support the implementation, monitoring and enforcement of this program and the coordination of those functions. Each Secretariat shall ensure that Agencies establish, subject to guidelines developed by the Secretary of Administration and Finance or his/her designee, special provisions that serve as governing standards for contract compliance. It is the intention of this Executive Order that the principles underlying the affirmative market program be incorporated into the fabric of general management in state government.

Each Secretariat shall report annually to the Secretary of Administration and Finance on the effectiveness of the program, including a report of the total dollar amounts awarded and actually paid to M/WBEs in all areas of state contracting. The Secretary of Administration and Finance shall report annually, within ten weeks of the issuance of the Annual Financial Report by the Office of the Comptroller, to the Minority and Women Business Enterprise Oversight Committee established by this Executive order and to the Governor.

**Section 5. Minority and Women Business Enterprise Oversight Committee.** The Secretary of Administration and Finance shall appoint a Minority and Women Business Enterprise Oversight Committee, not to exceed twenty members, which shall assist the Secretary in the implementation of this Executive order. Oversight Committee members shall serve for two year terms, except that in the initial appointments, one half shall be appointed to one year terms, and one half shall be appointed to two year terms. Members may serve a maximum of three (3) full two year terms.

**Section 6. Independent Authorities and Public Institutions of Higher Learning.** Independent authorities and public institutions of higher learning are encouraged to adopt M/WBE policies and programs consistent with this Executive Order.

**Section 7. Sunset Provision.** The Executive Office for Administration and Finance shall review the program described in this Executive Order at least every five years. The review shall determine: whether the objectives are being met; whether the conditions giving rise to the Order continue to exist; whether race and gender neutral measures are capable of addressing the effects of discrimination without the other measures specified in the order; and whether the program described in the Order should be modified or sunsetted.

Section 8. Effective Date. With the exception of the goal component of the affirmative market program, as set forth in Section 2 of this Executive order, all provisions of this Executive Order are effective immediately. The goal component of Order 237, as set forth in Section 1.2 of Executive Order 237, shall remain in effect until revised goals - are developed pursuant to Section 2 of this Executive Order, but in no event shall it remain in effect beyond January 1, 1997. All other provisions of Executive Order 237 are hereby immediately revoked.

Given at the Executive Chamber in Boston this  
6<sup>th</sup> day of August in the year one thousand nine  
hundred and ninety-six.

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William F. Weld, Governor  
Commonwealth of Massachusetts

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Argeo Paul Cellucci, Lieutenant Governor  
Commonwealth of Massachusetts

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William Francis Galvin  
Secretary of the Commonwealth

**GOD SAVE THE COMMONWEALTH OF MASSACHUSETTS**